SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-1007

NO. ------

REGENCY REALTY, ET AL.,

Petitioners,

V.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FELIX S. JACOB,

905 Blaustein Building,
One North Charles Street,
Baltimore, Maryland 21201,

Attorney for Petitioners.

The Daily Record Co., Baltimore, Md. 21203

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered August 10, 1971, and denial of a timely petition for rehearing entered in this proceeding on September 10, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit and the denial of petition for rehearing (Docket Nos. 71-1022 — 71-1038) have not yet been reported but are appended hereto (Appendix B and C, *infra*, pp. 1a-2a).

The order of the Tax Court denying Petitioners' motions to vacate and extend time (Appendix A, *infra*, 1a) was not reported.

JURISDICTION

The judgment of the Court below (App. 1a) was entered on August 10, 1971. A timely petition for rehearing was denied on September 10, 1971 (App. 2a). The jurisdiction of this court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

In 1966, the President of seventeen corporations hired counsel to represent him in proceedings taken by the Commissioner of Internal Revenue to recover certain tax deficiencies. A claim of $150,000 was accepted by the Government and was the basis for seventeen stipulated decisions in the Tax Court. However, when Petitioner received his tax bill, an additional $38,000 interest was included which amount he claimed was never disclosed to him by his attorneys. Represented by new counsel, a motion was filed to vacate the stipulated decisions. At the hearing on the motion the former attorneys testified that Petitioner knew that his offer of settlement would not include interest. The questions presented here relate to the admissibility into evidence of the testimony of the former attorneys. The questions are

a. Whether the Tax Court should have looked to the law of the District of Columbia in ruling on the objection to the admissibility of evidence based on the attorney-client privilege.

b. Whether petitioners' Fifth Amendment right to due process of law was denied by the failure of the Tax Court and the Fourth Circuit Court of Appeals to follow the law of the attorney-client privilege as reported in cases of the Second and Ninth Circuits.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in relevant part that "No person shall be . . . deprived of life, liberty or property without due process of law."

STATUTES INVOLVED

Tax Court Rule 31. Evidence and the Submission of Evidence.

"(a) Rules Applicable — The trials before the Court and its Divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia."

Fed. R. Civ. Rule 13(a). Review of Decisions of the Tax Court.

"(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later."

Fed. R. Civ. Proc. Rule 43. Evidence.

"(a) Form and Admissibility — In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of

evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held."

18 U.S.C. §208. Acts affecting a personal financial interest.

"(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such

officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services."

STATEMENT OF THE FACTS

Petitioners are seventeen corporations of which Milton Kirsner is the President. Respondent is the Commissioner of Internal Revenue. The Commissioner had determined deficiencies in the amount of $346,399.82 with respect to the seventeen corporations involved in this appeal and notified taxpayer that if he wished to challenge the determination it would be necessary to file a petition within 90 days. Kirsner retained Arnold Fleischmann to represent him in the matter. Fleischmann later brought Samuel Silber into the case as co-counsel.

Kirsner offered a proposal of $150,000 as full settlement of all taxes and penalties. This offer was accepted by the Government and was the basis for seventeen stipulated decisions entered in the Tax Court of the United States, which may have not been ordered signed by the U. S. Attorney. However, over a period exceeding thirty days, Kirsner received bills which totaled a sum in excess of $188,000. The difference in amount was due to an added interest factor on the amount of the bills. Kirsner agreeing only to a settlement of $150,000 suggested an appeal of the decision but his counsel refused to represent him. No orders of satisfaction were filed.

Petitioner determined to exercise his right of appeal and retained Felix S. Jacob, who on September 29, 1969, filed a Motion for Leave to File Motion to Vacate Decision, a Motion to Vacate Decision, and a Motion to Extend Time to File Petition. The basis for appellant's motion for leave

to file a motion to vacate decision was Rule 18 of the Tax Court. Appellant contended in support of his motion that Kirsner had received tax bills after 30 days from the Order of the Court which amounted to a sum in excess of $188,000.00 after his offer of $150,000.00 had been accepted. Appellant alleged that this major variation was never explained to him. In addition, Appellant alleged that he had retained new counsel. This was difficult and took considerable time, inasmuch as he was handicapped by being under the care of physicians for mental problems and a tumor. Appellant further alleged in his motion that he was advised by new counsel that the 150% declining balance depreciation method was available in all open years and that after 30 days from July 1, 1969, the Commissioner of Internal Revenue announced that it would not pursue any more appeals attacking the entity of medical corporations and this new decision would be a material factor in all of these 17 cases which involve a similar attack of the corporate entity.

On October 20, 1969, subsequent to their filing suit against the Appellants and Kirsner for services rendered in this matter, Fleischmann and Silber filed a Motion under Rule 24(b) for leave to withdraw appearance of counsel which was granted by an Order dated November 19, 1969.

A hearing was held on the motions on October 22, 1969, which resulted in an order of continuance. On November 19, 1969, a hearing was held before Judge Sterrett on the motions. At the hearing, Appellees contended that the Court lacked jurisdiction to hear the motions. Appellees noted that under Section 7481 a decision becomes final upon the expiration of time for filing a review. Under Section 7483, this time period is established to be 90 days. Appellees also asserted that under Rule 19F the statutory time period to file a motion to vacate was 30 days. In addition, Appel-

lees contend that the interest factor was fully explained to the taxpayer, including the fact that the settlement did not include interest. To establish this later point, Appellees obtained testimony from Appellants' prior attorneys, Fleischmann and Silber.

The case was held under advisement by the Court. On August 24, 1970, Judge Sterrett signed the order from which this appeal is taken denying Appellants' motion for leave to file a motion to vacate decision and motion to extend time to file petition for review.

It should be noted that at the time Fleischmann and Silber were called to testify for the Government, they had suits pending in the Maryland courts for the recovery of $38,000 in fees based on 15% of the difference between the original assessment and the actual judgment. Federal regulations (Title 31 C.F.R. §10.28) provide that no attorney, C.P.A., or enrolled agent shall charge an unconscionable fee for representation of a client in any matter before the Internal Revenue Service. The Tax Court denied petitioners motion for leave to file a motion to vacate decision and motion to extend time to file petition for review. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on various grounds, including the impropriety of the testimony of Kirsner's former counsel on the basis of the attorney-client privilege. In its Opinion dated August 10, 1971, the Court of Appeals affirmed the denial of petitioners motions. Timely petition for re-hearing was denied September 10, 1971. From that judgment this writ is prayed.

REASONS FOR GRANTING CERTIORARI

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER FEDERAL COURTS SHOULD APPLY STATE OR FEDERAL LAW IN FEDERAL TAX INVESTIGATIONS AND HAD THE TAX COURT APPLIED THE LAW OF THE DISTRICT OF COLUMBIA, THE TESTIMONY OF THE FORMER ATTORNEYS MAY HAVE BEEN EXCLUDED.

Petitioners urge that the Tax Court in ruling on the admissibility of evidence offered by the former attorneys should have looked to the law of the forum. This position is consonant with that of the Ninth Circuit as enunciated in *Baird v. Koerner*, 279 F. 2d 623 (9th Cir. 1960). In *Baird*, an attorney refused to identify his clients to a revenue agent on the ground that the communications to him from the accountants of the clients whose names had not been revealed to him were privileged. The revenue agent thereupon filed a petition in the District Court to enforce the summons and when the attorney continued to refuse to answer he was found guilty of civil contempt. Reversing the judgment of the lower court insofar as it ordered the attorney to reveal any information regarding the persons who employed him, the Court of Appeals held that the scope of the attorney-client privilege, being an incident of the power of the State to create attorneys was governed by state law and that under California law of privilege which protects disclosure of clients identity, the attorney did not have to give the requested information.

If the Tax Court applied the laws of the District of Columbia in ruling on the objected evidence, the testimony of former counsel would have been excluded. The rule of attorney-client privilege in the District of Columbia was laid down in *Elliott v. U. S.*, 23 App. D.C., 456 (1904). Elliott, an attorney, was summoned as a witness to testify

in the trial of a contested will. He was called by the caveatees and was asked what the testator had said to him about a will. The attorney testified that one day the testator asked him where he had been, to which the attorney responded "I have just been up to make . . . gentleman's will". The testator then stated "that reminds me I want to have mine fixed." On cross examination defense counsel asked the identity of the person for whom the attorney prepared the will which Elliott declined to answer on the basis of privilege and was held in contempt. On appeal the court reversed, stating:

> "Professional communications made by the client to the attorney are upon principles of public policy and from the necessity of preserving confidence in all matters of business where the assistance of an attorney is required are privileged from disclosure and this privilege is that of the client rather than the attorney. The privilege embraces *all* communications made by the client to his attorney for and in the course of business for which the attorney may be employed. The attorney cannot be permitted to disclose such communications whether in the form of papers delivered or statements made."

Petitioners emphatically contend that in ruling on the objectionable testimony the Tax Court was obliged to look to this rule and make a determination as would the highest court of the District of Columbia. As was pointed out by this very Court in *Hormel v. Helvering*, 312 U.S. 552 (1941),

> "rules of practice and procedure are devised to promote the ends of justice, not defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy."

Therefore, where injustice might otherwise result a reviewing court may consider questions of law not pressed

below. Clearly, if the Tax Court applied the wrong law in ruling on the objectionable testimony, grave injustice to petitioner would result. Therefore, in passing on this petition, we pray the Court to consider this argument.

II.

DECISIONS OF OTHER COURTS OF APPEALS HAVE REFUSED TO ALLOW AN ATTORNEY TO TESTIFY AS TO KNOWLEDGE RECEIVED FROM HIS CLIENT WHILE THE RELATIONSHIP OF ATTORNEY-CLIENT EXISTED.

Petitioners contend that the testimony of former counsel should have been excluded. This is in accord with decisions by the Second and Ninth Circuits. In *Republic Gear Co. v. Borg Warner*, 381 F. 2d 551 (2nd Cir. 1967), plaintiff brought a diversity action against defendant for tortious interference with contract relations plaintiff had with two Brazilian corporations. Plaintiff sought the deposition of the attorney who had represented the Brazilian corporations at the time they suspended contract relations with plaintiff claiming that the desired documents would reveal that the foreign corporation ceased relations with plaintiff because of inducements by defendant. The attorney refused to produce certain documents claimed to be within the attorney-client privilege and hence excusable from depositional examination. It should be noted that the attorney was no longer representing the clients whose documents he was seeking to protect nor did these former clients request him to claim the privilege, thereby "opening the door" by not complying with the federal common law rule which states that "the privilege applied only if . . . it has been claimed by the client." See *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950). However, the court held that the documents were within the privilege and immune from discovery.

The decision below also conflicts in principal with *Baldwin v. Commissioner of Internal Revenue*, 125 F. 2d 817 (9th Cir. 1942). In this case the decedent mother expressed to her attorney the desire to have certain property go to her son. The witness suggested a method which would save the expense of the administration at her death. However, the Internal Revenue claimed that the transfer was intended to take effect in possession for enjoyment at or after death and therefore taxable. In an attempt to prove this, the government called the attorney as witness and asked questions which were objected to on the basis of privilege. The objections were overruled. The Ninth Circuit reversed and held that the information sought was privileged. It is significant to note that the court upheld the privilege despite the fact that the door was opened by the son's presence at certain discussions between the attorney and the mother, which is contrary to the accepted rule that a communication is not confidential if in the presence of a third person, not the agent of either the client or attorney.

III.

PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT WERE ABRIDGED BY THE PROCEEDINGS IN THE TAX COURT.

Petitioner asserts that his constitutional right to due process of law under the Fifth Amendment was violated by the Tax Court proceedings. The Fifth Amendment provides that no person shall "be deprived of life, liberty or property without due process of law". Inherent in this phrase is the guarantee of a fair trial in a fair tribunal. *American Cyanamid v. F.T.C.*, 363 F. 2d 757 (6th Cir. 1966). The circumstances in the Tax Court clearly deprived petitioner of the requisite fair and equitable proceedings.

Initially, the Trial Judge allowed the testimony of petitioners two prior attorneys — a breach of the confidential attorney-client relationship in derogation of evidentiary rules to such a shocking extent that it violated a Constitutional right. See *Rochin v. California*, 342 U.S. 165 (1952). Here the two prior attorneys in another action had sued petitioner for fees based upon 15% of the difference between the original assessment and the actual judgment, which may be in violation of 18 U.S.C. §208. The success of the Government in preserving the judgments had a direct bearing on the success of the prior attorneys in collecting their fee and takes them out of the realm of a neutral impartial onlooker and casts them as stakeholders along with the Government in proving there was no mistake of fact and that Kirsner knew and anticipated the enormous amount of interest. This factor added to the initial taint of the attorney-client relationship should have been enough to exclude the evidence. Other factors lend support to this argument. The testimony of the attorneys admits that Kirsner was under medical care during the period of negotiations. It hardly seems equitable that one should be deprived of property in a situation where he signed stipulated decisions while suffering from mental and physical illness and in ignorance of the fact that the tax bill would be more than 25% greater than the agreed sum.

In *Smyth v. United States*, 92 F. 2d 900 (10th Cir. 1937), a suit by the Government to recover an erroneous tax refund, the parties stipulated, after judgment for the Government, that no appeal would be taken. The Government thereafter sought a rehearing on the ground that the court had erred in not allowing interest, as required by statute, from the date of the original refund payment. The court held the Government bound by the stipulation for settle-

ment made by the attorneys empowered to represent it in court.

The Trial Judge heard the case in the Tax Court, sitting in Washington, D.C., on November 19, 1969, but refused to admit into evidence a medical report from Dr. Philip Lerner, a Baltimore psychiatrist, now deceased. This letter was taken at his deathbed and concerned some of the emotional problems of Mr. Kirsner. The rules of the Tax Court discourage pre-trial depositions and encourage stipulation of the material facts. Then the Trial Judge over 9 months later, on August 24, 1970, denied all of Petitioners' motions.

However, we strongly urge that looking at the totality of circumstances, the admission of questionable evidence, the fact that prior counsel were financial stakeholders with a contingent fee interest, and Kirsner's mental and physical incapacity, the Tax Court proceedings violated petitioner's Fifth Amendment constitutional right and, therefore, the cause should be remanded. In addition, the Orders of the Tax Court were illegal in that the Tax Court is without jurisdiction to impose interest on a taxpayer and to enter a settlement. Tax claims are settled by Internal Revenue Service alone in the Tax Court, where the Service represents the Government, and in other cases, only prior to reference of the claim to the Department of Justice for litigation. 26 U.S.C. §7122.

CONCLUSION

Petitioners do not seek to evade the payment of tax deficiencies as has been claimed by the Government. Rather, they seek a fair trial on the merits or a reversal. The opinion of the Fourth Circuit was "The Motion was not filed until 88 days after decision. Ordinarily a motion to vacate should be filed within 30 days." Rule 19 of the Tax Court allows 90 days to file a motion for leave to file

a motion to vacate a decision. There were not ordinary circumstances here and taxpayers did file within the 90 days allowed under Rule 19 of the Tax Court and Rule 13a of the Federal Rules of Appellate Procedure. Certainly, it was a serious abuse of discretion to deny Taxpayers' motions when the Tax Court judge did not follow basic rules of evidence, as per the cited Second and Ninth Circuit decisions, and so denied Taxpayers' fundamental constitutional rights to a fair trial. In *Smyth*, it was held that interest may be waived. Here, Taxpayers have made the same contention and have had their assets attached pending this appeal. The attorney-client privilege is too basic to our American system of justice to be disregarded. The granting of this petition for a writ of certiorari would be a first step in obtaining a fair trial on the merits or a reversal, and therefore pray that it be granted.

Respectfully submitted,

FELIX S. JACOB,

Attorney for Petitioners.

APPENDIX A

ORDER OF TAX COURT OF UNITED STATES

After due consideration Petitioners' Motion For Leave To File A Motion To Vacate Decision and Petitioners' Motion To Extend Time To File Petition For Review are hereby Denied.

/s/ SAMUEL B. STERRETT,
Judge

Dated: Washington, D.C.
August 24, 1970.

APPENDIX B

United States Court of Appeals
For The Fourth Circuit

Nos. 71-1044 — 71-1038

Regency Realty, et al.,
Appellants,

versus

Commissioner of Internal Revenue,
Appellee.

Appeal from the Tax Court of the United States, Samuel B. Sterrett, Judge.

Argued June 8, 1971 Decided August 10, 1971

Before Haynsworth, Chief Judge and Bryan and Craven, Circuit Judges.

Felix S. Jacob (Bertram M. Goldstein on brief) for Appellant in No. 71-1022 thru 71-1038; and Mary J. McGinn Attorney, Tax Division, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Meyer Rothwacks, Grant W. Wiprad, Attorneys, Department of Justice, on brief) for Appellee in Nos. 71-1022 thru 71-1038.

Per Curiam:

This is an appeal from the refusal of the Tax Court to grant a motion for leave to file a motion to vacate a prior decision of the Tax Court.* Finding no abuse of discretion, we think the denial of the motion should be

AFFIRMED

APPENDIX C

United States Court of Appeals
For The Fourth Circuit

Nos. 71-1022 — 71-1038

Regency Realty, et al.,

Appellants,

versus

Commissioner of Internal Revenue,

Appellee.

Appeals from the Tax Court of the United States.

ORDER

(Filed September 10, 1971)

With the concurrence of Judge Haynsworth and Judge Bryan, the petition of appellants for rehearing is denied.

For The Court

BRAXTON CRAVEN,
United States Circuit Judge.

A True Copy Test:

SAMUEL W. PHILLIPS, Clerk,
by DIANE BURKE,
Deputy Clerk.

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* The motion was not filed until 88 days after decision. Ordinarily a motion to vacate should be filed within 30 days.

APPENDIX D

Supreme Court of the United States
No. A-575 October Term, 1971

Regency Realty, Inc., et al.,
Petitioners,
v.
Commissioner of Internal Revenue

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1972.

/s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 6 day of December, 1971.